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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

F & H CONSTRUCTION, INC., Plaintiff and Appellant, v. I. KRUGER, INC., Defendant and Appellant.	C058312 (Super. Ct. No. 04AS05135)

The appeal requires us to interpret the terms of an indemnity provision in a purchase agreement between a supplier and a general contractor, and the cross-appeal requires us to interpret the terms of a partial settlement between the same parties. We reject F & H Construction, Inc.'s (F&H) far-fetched and counterintuitive construction of both agreements. Thus, the supplier, I. Kruger, Inc. (Kruger) prevails on both the appeal and the cross-appeal. We affirm the judgment entered in favor of Kruger based on the jury finding that it was not negligent, and we reverse the judgment based on the trial court's erroneous conclusion that a fee provision contained in a partial settlement applied to the litigation of the causes of action

that had been expressly excluded from the terms of the settlement.

FACTS

Only a brief summary of the facts is required to understand the issues before us. Suffice it to say, F&H, a general contractor hired by a water agency to upgrade a water treatment plant, purchased a water clarification system from Kruger. After F&H finished its installation, the agency complained to F&H that a part of the system was sagging. F&H consulted with Kruger. As F&H employees attempted to weld support brackets to remedy the problem, a spark, emitted from a welding instrument, started a fire. The fire caused extensive damage to the building in which the system was located. F&H rebuilt the building, but the upgrade of the treatment plant was substantially delayed.

F&H sued the agency, Kruger, and others to recoup the amounts it spent rebuilding and for extra work. Most of these parties filed cross-complaints against F&H and one another. Kruger cross-complained against F&H for amounts it alleged were due under the purchase order agreement. Kruger settled this claim, and that agreement gave rise to the attorney fee issues raised in the cross-appeal. Only F&H's claims against Kruger relating to the fire were tried in the underlying case.

F&H's theory at trial was that Kruger bore direct responsibility for the fire. It requested, however, a jury instruction and a special verdict based on a theory that under an indemnity provision in the purchase order agreement, Kruger

bore vicarious responsibility for the actions of the welders who caused the fire. The jury instruction would have provided: "[Y]ou will be asked to address the conduct of persons or entities who may have been directly or indirectly employed by the defendant Kruger. The word 'employ' is defined by Webster's as: to make use of (someone or something inactive); to use advantageously; to use or engage the services of." F&H also proposed a special verdict form corresponding to this proposed instruction.

The trial court rejected F&H's construction of the indemnity provision contained in the purchase agreement and refused to give the proposed instruction and the verdict form. The trial court reasoned that the term "employed," when interpreted in the context of the indemnity clause and the purchase order agreement as a whole, meant "hiring people to do work," rather than "mak[ing] use of." The court also explained that no extrinsic evidence had helped clarify the meaning of the indemnity clause.

The jury found that Kruger was not negligent, and judgment was entered in its favor. F&H appeals from that judgment.

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The Appeal

F&H's request for a jury instruction at trial was predicated on the following indemnification provision in the purchase agreement: "11. INDEMNITY. [Kruger] shall indemnify and save harmless [the agency] and [F&H] . . . of and from any and all claims, demands, causes of action, damages, costs,

expenses, actual attorneys' fees, losses or liability, in law or in equity, of every kind and nature whatsoever ('Claims') arising out of or in connection with [Kruger's] operations to be performed under this Agreement for, but not limited to: [¶] (a) Personal injury, including, but not limited to bodily injury, emotional injury, sickness or disease, or death to persons, including, but not limited to, any employees or agents of [Kruger], [the agency], [F&H], or any other subcontractor and/or damage to property of anyone (including loss of use thereof), caused or alleged to be caused in whole or in part by any negligent act or omission of [Kruger] or anyone directly or indirectly employed by [Kruger] or anyone for whose acts [Kruger] may be liable regardless of whether such personal injury or damage is caused by a party indemnified hereunder. [¶] . . . [¶] . . . Such indemnity provisions apply regardless of any active and/or passive negligent act or omission of [the agency] or [F&H] or their agents or employees. [Kruger], however, shall not be obligated under this Agreement to indemnify [the agency] or [F&H] for Claims arising from the sole negligence or willful misconduct of [the agency] or [F&H] or their agents, employees or independent contractors who are directly responsible to [the agency] or [F&H], or for defects in design furnished by such persons."

The respective responsibilities of the parties were set forth in the agreement as well. F&H or the water agency were responsible for "[i]nstall[ing] . . . all equipment and materials provided by Kruger Supplier." Kruger's supervisory

role was expressly limited. "Kruger's construction advisor's role is not supervisory nor does Kruger's representative direct [F&H's] labor force or establish detailed work methods, schedules or sequences except as specifically required to meet Specifications."

F&H argues on appeal, as it did in the trial court, that the indemnity clause obligated Kruger to indemnify F&H for damage caused by the negligence of "anyone directly or indirectly employed by [Kruger]," that "employed by" meant "used by," and that the F&H employee welders were "used by" Kruger to perform repairs on the water treatment system. The proposed jury instruction sought to incorporate this meaning of the word "employed" as follows: "[Y]ou will be asked to address the conduct of persons or entities who may have been directly or indirectly employed by the defendant Kruger. The word 'employ' is defined by Webster's as: to make use of (someone or something inactive); to use advantageously; to use or engage the services of."

The trial court rejected F&H's meaning of the word "employ" and therefore refused the proferred jury instruction. The court reasoned that the term "employed," when interpreted in the context of the indemnity clause and the purchase order agreement as a whole, meant "hiring people to do work," rather than "mak[ing] use of." Both parties agree that because there was no extrinsic evidence submitted regarding the meaning of the indemnity clause, interpretation of the terms of the contract presents a question of law. Both sides urge us to construe the

indemnity language in the context of the contract as a whole. (*Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541.) While the parties agree on the legal principles guiding our review, they disagree on the outcome such an analysis will achieve.

F&H focuses our attention on the language, "[Kruger] or anyone directly or indirectly employed by [Kruger] or anyone for whose acts [Kruger] may be liable." F&H argues that the trial court's interpretation renders meaningless the language "indirectly employed" and "anyone for whose acts [Kruger] may be liable." Moreover, F&H encourages us to accept a common dictionary meaning of "employed" to encompass "use" rather than the more restrictive meaning associated with "hire." In F&H's view, the contract language "clearly and unambiguously" intended to encompass the acts or omissions of "all those persons or entities turned to by Kruger for performance of its obligations."

Kruger, on the other hand, insists that construing "employ" to mean "hire" harmonizes the indemnity clause with other parts of the agreement and gives full effect to each word in the indemnity clause. Kruger further maintains that F&H's interpretation would shift liability for the sole negligence of F&H to Kruger and thereby violate Civil Code section 2782's prohibition on such indemnification agreements.[1] To the extent

[1] Because we reject F&H's interpretation of the indemnity agreement in the context of the contract as a whole, we need

there is any ambiguity, Kruger reminds us to construe the language against F&H because it drafted the agreement.

F&H looks to Kruger to indemnify it for the losses arising from the fire despite the fact that it assumed "sole responsibility" for installing Kruger's equipment, because it had consulted with Kruger before beginning the repairs, Kruger had failed to warn it that the material was flammable, and Kruger had agreed to pay for the repairs. Although Kruger had not "employed" F&H in the traditional sense of "hiring" it to perform the work, F&H argues that Kruger "employed" it by utilizing it to remedy the defects found by the agency.

F&H would have us ignore the context in which we must decide this appeal. First, it performed the welding that triggered the fire on behalf of the water agency in its capacity as a general contractor and not on behalf of Kruger. Second, a jury found that Kruger was not negligent. As a result, F&H asks us to read the indemnity agreement to require Kruger, exonerated by the jury, to assume sole and vicarious responsibility for F&H's actions. Thus, F&H bears the insurmountable challenge to point to specific contractual language to support its counterintuitive notion that a nonnegligent supplier should indemnify a general contractor for acts it neither contracted nor supervised.

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not address Kruger's argument that F&H's interpretation would violate Civil Code section 2782.

F&H relies on the contractual language "indirectly employed" and the dictionary definition that allows a loose meaning of "employed" to include "use." We agree with the trial court that F&H stretches "employed" far beyond the usage envisioned by this agreement. We agree with Kruger that the reference to "indirectly employed" by Kruger undoubtedly refers to any special employees Kruger may be temporarily supervising. (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 174-175.) This interpretation does not, as F&H insists, nullify Kruger's indemnity obligation. Rather, it confines Kruger's vicarious liability for those agents or certain independent contractors it hires.

We must construe the meaning of "employed" in the context of the contract as a whole. F&H bore sole responsibility for installing all equipment and materials supplied by Kruger. The welding of the support brackets was included, therefore, within the scope of F&H's responsibility. To construe "employed" to mean "use" would shift responsibility for installation to Kruger in derogation of the plain language of the contract. Our construction of the agreement mirrors that of the trial court. As a matter of law, we agree the parties did not intend that the indemnification's reference to indirect employment included Kruger's consultation with the general contractor to install the equipment the general was contractually obligated to install. Simply put, Kruger did not "employ" F&H and had no contractual obligation to indemnify its employees for causing a fire during the welding of the support brackets.

Cross-Appeal for Attorney Fees

There was no shortage of complaints and cross-complaints filed in the aftermath of the devastating fire in the water treatment building; all but one settled. Even F&H and Kruger settled their claims except those involving the fire. The trial court denied Kruger's request for attorney fees for the litigation initiated by F&H on the indemnity agreement. The question presented by Kruger's cross-appeal is whether the attorney fees provision in the partial settlement agreement dictating that each party is to bear its own fees and costs should prevail over the attorney fees clause contained in the purchase order agreement allowing fees to the prevailing party. The parties again agree that the trial court's denial of fees presents a purely legal issue subject to de novo review. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.)

The partial settlement agreement expressly limits the scope of the settlement. The agreement provides, in pertinent part:

"F&H and KRUGER hereby mutually release each other of all claims, on any and all legal theories, arising out of the [Foothill Water Treatment Plant] project except:

"(a) The claims presently asserted by F&H in the suit against KRUGER for damages and/or indemnity for the loss caused by the fire of June 21, 2001 at [the Foothill Water Treatment Plant], and defenses thereto;

". . . .

"This agreement is in lieu of, supersedes, and extinguishes all other agreements, negotiations, understandings, and

representations which may have been made or entered into by and between F&H and KRUGER with respect to the subject matter of this agreement, except for those specifically set forth herein. . . .

"The parties will take such steps as are necessary to effectuate the dismissal of F&H's and KRUGER's currently pending pleadings consistent with the settlement set forth herein. Each party will bear its own costs and fees."

There is really very little to say to resolve the cross-appeal. The scope of the agreement could not be clearer. It expressly excepts the indemnification claim from the settlement. As a consequence, the attorney fee provision in the partial settlement applies only to the subject matter of the agreement itself. It could not usurp the attorney fee provision in the purchase agreement simply because the partial settlement did not apply to the claims left outstanding under that agreement.

We disagree with the trial court's admonition that sophisticated lawyers should have foreseen the potential ambiguity and further limited the attorney fee provision in the settlement agreement by excluding fees not covered by it. But what could be clearer than expressly excluding the very lawsuit we now have before us? And what conscientious lawyer could possibly anticipate that the scope of the fee provision would be broader than the scope of the settlement itself? The court would impose an unreasonable burden on counsel to be redundant. Having clearly stated that the settlement did not apply to the lawsuit then underway and now before us, counsel should not be

expected to anticipate that someone might broaden the scope of the fees provision beyond the scope of the agreement itself. We, in fact, like to discourage poor draftsmanship of that nature and reject such an unlikely reading of what to our eyes was a very clear effort to limit the scope of the agreement, including the attorney fee provision.

DISPOSITION

The judgment is affirmed insofar as it denies relief to F&H and reversed insofar as it denies attorney fees to Kruger as the prevailing party. The case is remanded to the trial court for a hearing on the amount of attorney fees to be awarded Kruger. Kruger shall recover its costs for the appeal and the cross-appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

RAYE, J.

We concur:

SIMS, Acting P. J.

HULL, J.